

**A Captain Rudolph Adrain Joseph (also known as Rudolph
Adrian Joseph) v Malaysian Airline System Bhd & Anor
(CIMB Bank Bhd, garnishee) (No 2)**

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HIGH COURT (KUCHING) — SUIT NO 22–86 OF 2007-II
ABDUL AZIZ ABD RAHIM J
25 FEBRUARY 2008

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*Civil Procedure — Judgment — Consent judgment — Termination of
employment — Issuance of letter of offer to plaintiff — Defendant attempted to
vary terms of consent order by not including in offer letter entitlements of
employment due to plaintiff without consent from plaintiff*

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The first defendant issued a letter dated 24 November 2006 terminating the plaintiff's services as a pilot. Under the MAPA agreement 2004–2007 all the pilots of the first defendant and the plaintiff were guaranteed employment without discrimination till the age of 60 subject to being medically fit, a test which the plaintiff had undergone and succeeded. On 28 May 2007, the plaintiff filed a suit (encl 4) and a summons in chambers (encl 8) against the first defendant seeking various reliefs including specific performance of the

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plaintiff's contract of employment on terms and conditions not less favourable than those contained in the MAPA agreement 2004–2007 entered into between the first and the second defendants and declaratory orders that the MAPA agreement 2004–2007 between the first and second defendants was binding on the first defendant. On 14 June 2007, the parties entered

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consent judgment ('the first consent judgment'). However, the plaintiff alleged that the first defendant's letter of offer did not comply with the terms of the first consent judgment. In addition, the plaintiff also alleged that the letter was received by the plaintiff only on 16 October 2007, a delay of 120 days from the date of entry of the first consent judgment. The plaintiff then

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filed a summons in chambers (encl 23) to seek, inter alia, an order that the first defendant complies with the terms and conditions of the first consent judgment. When encl 23 came up for hearing on 19 December 2007, the parties consented to record and enter a consent judgment on the terms prayed for by the plaintiff including an alternative prayer, ie to pay the plaintiff all

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the backwages inclusive of the allowances and forget about the re-employment of the plaintiff until the year 2012 ('the second consent judgment'). However, subsequent to the second consent judgment, there was still no full compliance by the first defendant. In consequence, the plaintiff filed a summons in chambers' application (encl 43) against the garnishee to

direct the garnishee to pay to the plaintiff as judgment creditor the garnishment sum agreed by the first defendant. The sum to be garnished or attached was RM1,384,383.80 ('the garnishment sum') in the hand of or coming into possession of the garnishee ie CIMB Bank Bhd.

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Held, allowing the application in encl 43:

On the facts and evidence disclosed in the affidavit supporting the plaintiff's application in encl 43, the court was satisfied that the first defendant had failed to comply with the terms of the two consent judgments. It would appear that the revised letter of offer dated 4 October 2007 issued to the plaintiff vide letter dated 24 October 2007 was the first attempt to vary the terms of the consent order by not including in the offer the entitlements of the employment due to the plaintiff as agreed and envisaged in the consent judgments in the spirit of MAPA agreement 2004–2007. This variation was not with the consent of the plaintiff (see para 29); *Visia Finance Bhd v Expert Credit & Leasing Sdn Bhd & Ors* [1998] 2 MLJ 705 and *Zainudin bin Muhammad v Atsco Ltd & Anor* [2003] 1 MLJ 369 referred.

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[Bahasa Malaysia summary]

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Defendan pertama telah mengeluarkan surat bertarikh 24 November 2006 menamatkan perkhidmatan plaintif sebagai juruterbang. Di bawah perjanjian MAPA 2004–2007 semua juruterbang defendan pertama dan plaintif telah dijamin pekerjaan tanpa diskriminasi sehingga umur 60 tahun tertakluk kepada kesihatan, ujian yang plaintif telah jalani dan berjaya. Pada 28 Mei 2007, plaintif telah memfailkan guaman (lampiran 4) dan saman dalam kamar (lampiran 8) terhadap defendan pertama memohon pelbagai relief termasuklah pelaksanaan spesifik kontrak pekerjaan plaintif bagi terma-terma dan syarat-syarat yang tidak kurang faedahnya daripada yang terkandung dalam perjanjian MAPA 2004–2007 yang dimasuki antara defendan-defendan pertama dan kedua dan perintah-perintah deklarasi bahawa perjanjian MAPA 2004–2007 antara defendan-defendan pertama an kedua mengikat defendan pertama. Pada 14 Jun 2007, pihak-pihak memasuki penghakiman persetujuan ('penghakiman persetujuan pertama'). Plaintif mengatakan bahawa surat tawaran defendan pertama tidak mematuhi terma-terma penghakiman persetujuan pertama. Tambahan pula, plaintif juga mengatakan bahawa surat tersebut diterima oleh plaintif hanya pada 16 Oktober 2007, yang lewat 120 hari dari tarikh kemasukan penghakiman persetujuan pertama itu. Plaintif kemudian telah memfailkan saman dalam kamar (lampiran 23) memohon, antara lain, perintah agar defendan pertama mematuhi terma-terma dan syarat-syarat penghakiman persetujuan pertama. Apabila lampiran 23 dihadapkan untuk perbicaraan pada 19 Disember 2007, pihak-pihak bersetuju untuk merekodkan dan memasuki penghakiman

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- A persetujuan berdasarkan terma-terma yang dipohon oleh plaintif termasuklah permohonan alternatif, iaitu untuk membayar plaintif kesemua gaji tertunggak termasuklah elaun-elaun dan melupakan pengambilan semula bekerja plaintif sehingga tahun 2012 ('penghakiman persetujuan kedua'). Walau bagaimanapun, berikutan penghakiman persetujuan kedua tersebut,
- B masih tiada pematuhan oleh defendan pertama. Akibatnya, plaintif telah memfailkan permohonan saman dalam kamar (lampiran 43) terhadap yang digarnis untuk membayar kepada plaintif sebagai pemiutang penghakiman jumlah garnisan yang dipersetujui oleh defendan pertama. Jumlah yang digarnis atau dilampirkan adalah RM1,384,383.80 ('jumlah garnisan') dalam
- C pegangan atau dalam milikan yang digarnis iaitu CIMB Bank Bhd.

Diputuskan, membenarkan permohonan dalam lampiran 43:

- D Atas fakta dan keterangan yang dikemukakan dalam affidavit yang menyokong permohonan plaintif dalam lampiran 43, mahkamah berpuas hati bahawa defendan pertama telah gagal mematuhi terma-terma kedua-dua penghakiman persetujuan tersebut. Ia jelas bahawa surat tawaran yang disemak bertarikh 4 Oktober 2007 yang dikeluarkan kepada plaintif melalui
- E surat bertarikh 24 Oktober 2007 adalah percubaan pertama untuk mengubah terma-terma perintah persetujuan dalam penghakiman persetujuan tersebut menurut perjanjian MAPA 2004–2007. Pengubahan ini dibuat tanpa persetujuan plaintif (lihat perenggan 29); *Visia Finance Bhd v Expert Credit & Leasing Sdn Bhd & Ors* [1998] 2 MLJ 705 dan *Zainudin bin Muhammad v Atsco Ltd & Anor* [2003] 1 MLJ 369 dirujuk.]
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Notes

For cases on consent judgment, see 2(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 4064–4065.

G Cases referred to

Chia Yan Tek & Anor v Ng Swee Kiat & Anor [2001] 4 MLJ 1 (refd)
Visia Finance Bhd v Expert Credit & Leasing Sdn Bhd & Ors [1998] 2 MLJ 705 (refd)

- H *Zainudin bin Muhammad v Atsco Ltd & Anor* [2003] 1 MLJ 369 (refd)

Legislation referred to

Rules of the High Court 1980 O 14 r 1, O 14A r 1, O 45 r 11, O 49 r 1, O 49 r 2, O 92 r 4

- I *Shankar RP Asnani (Francis Teron with him) (Thomas, Shankar Ram & Co Advocates) for the plaintiff.*
Jubilant Austinway (Gerawat Gala with him) (Zaid Ibrahim & Co Advocates) for the first and second defendants.
Azrin bin Ahmat (Idris & Co Advocates) for the garnishee.

Abdul Aziz Abd Rahim J:

ENCLOSURE 43

[1] This is the first defendant's appeal against my decision in encl 43.

[2] Enclosure 43 is the plaintiff's application by ex parte summons in chambers for garnishee order under O 49 rr 1 and 2 of the Rules of the High Court 1980 ('the RHC'). The sum to be garnished or attached is RM1,384,383.80 ('the garnishment sum') in the hand of or coming into possession of the garnishee that CIMB Bank Bhd to answer a judgment recovered by consent against the first defendant by the plaintiff in the High Court Kuching on 19 December 2007. I granted order in terms of the application with costs to the plaintiff.

[3] The application (encl 43) is grounded on para (6) of the consent order entered into between the plaintiff and the defendants on 19 December 2007 ('the second consent judgment') which is due or has become due by the first defendant to the plaintiff. The plaintiff contended that the first defendant had breached paras (1) and (2) of the second consent judgment by its failure to reissue directly to the plaintiff or caused to be reissued to the plaintiff a letter of appointment in accordance with the consent judgment entered between the plaintiff and the defendants on 14 June 2007 ('the first consent judgment'), the terms of the MAPA agreement 2004–2007 and the second consent judgment itself.

[4] Enclosure 73 is the first defendant's application by way of summons in chambers under O 45 r 11 and O 92 r 4 of the RHC for stay of execution and all proceedings to enforce the garnishee order absolute dated 11 January 2008 pending the determination and disposal of the appeal by the first defendant against my decision in encl 43. Further and in the alternative, the first defendant also sought orders for interim injunction to restrain the plaintiff or his servants or agents from dissipating or dealing with the garnishment sum paid by the garnishee pending the disposal of the first defendant's appeal and also for mandatory injunction against the plaintiff to compel him to return the garnishment sum he received from the garnishee pursuant to the garnishee order absolute within seven days from the date of the order.

[5] This application (encl 73) is grounded on several grounds. Firstly, the garnishment sum had been paid by the garnishee to the plaintiff. Secondly, the plaintiff is unemployed and does not have a source of income. Thirdly, there is a real danger that the garnishment sum be dissipated and that the

- A plaintiff would not be able to reimburse the same to the first defendant in the event the first defendant's appeal is successful and thereby renders the appeal nugatory. Fourthly, there is necessity to protect and preserve the garnishment sum from being dissipated. Fifthly, the first defendant is in a strong financial position and is able to satisfy any judgment or order of the court or the Court of Appeal made against it in favour of the plaintiff. Sixthly there are special circumstances to justify the grant for the stay order.
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BACKGROUND FACTS

- C [6] On 28 May 2007, the plaintiff, a senior captain working for the first defendant filed a suit (encl 4) against the first defendant seeking various reliefs including specific performance of the plaintiff's contract of employment for which the first defendant is bound to employ the plaintiff until the age of 60 and to retire in the year 2012 on terms and conditions not less favourable than those contained in the MAPA agreement 2004–2007 entered into between the first defendant and the second defendant which guarantees the plaintiff's rights without discrimination.
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- E [7] There has never been any dispute about the terms and conditions of the MAPA agreement 2004–2007 being binding on the first defendant which guarantees and protects the plaintiff's rights to be employed up to the age of 60 on terms and conditions that are not less favourable.
- F [8] In a related development, the plaintiff has filed a summons in chambers (encl 8) seeking various declaratory orders against the first and second defendants. The application in encl 8 was made pursuant to O 14 r 1 and O 14A r 1 of the RHC. Among the orders sought in encl 8 are: firstly, a declaration that the MAPA agreement 2004–2007 between the first defendant and second defendant is binding on the first defendant. Secondly, a declaration that the term 'subject to F50 aircraft being operated by the first defendant' in the plaintiff's contract of employment is in contravention of the MAPA agreement 2004–2007 or its implied terms and conditions and discriminatory therefore void being unlawful and contrary to public policy and the Federal Constitution. The application in encl 8 is prompted by the fact that under the MAPA agreement 2004–2007 all pilots of the first defendant and the plaintiff are guaranteed employment without discrimination till age of 60 subject to being medically fit, a test which the plaintiff had undergone and succeeded. Then by letter dated 26 January 2006 the first defendant issued to the plaintiff in Kuching by their office in Kuching that the plaintiff's employment was continued and accepted to be employed as pilot up to the age of 60. However subsequently, the first defendant issued a letter dated 24 November 2006 terminating the plaintiff's services. The first defendant did not file any affidavits to oppose the plaintiff's
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summons in chambers in encl 8 or to challenge the averments and depositions contained in the plaintiff's affidavit in support of encl 8 affirmed by the plaintiff on 30 May 2007. Instead on 14 June 2007 the parties entered consent judgment on the terms of the consent order in encl 20. With that the suit in encl 4 and the application in encl 8 were brought to their final conclusion.

[9] Clauses (1) to (3) of the consent judgment dated 14 June 2007 (the first consent judgment — exh R-20) reads as follows:

MALAYSIA

IN THE HIGH COURT IN SABAH AND SARAWAK AT KUCHING

SUIT NO. 22-86-2007-II

BETWEEN

CAPTAIN RUDOLPH ADRAIN JOSEPH

Also known as Rudolph Adrian Joseph,

[W.N.K.P. No. 520126-08-5521]

No. 26, Lot 1569, Lorong Angsana 5B,

Jalan Pisang Barat,

93100 Kuching, Sarawak

... Plaintiff

AND

MALAYSIAN AIRLINE SYSTEM BERHAD

A Company registered under the Companies Act 1965

With Company No. 10601-W

Having a Registered and Business Address at:

Tingkat 3, Administration Building 1, MAS Complex A,

Sultan Abdul Aziz Shah Airport,

47200 Subang, Selangor.

Also having a place of business

At Lot 215, Bangunan MAS,

Jalan Song Thian Cheok,

93100 Kuching, Sarawak

... 1st Defendants

Capt. Hizamuddin Bin Zainal Abidin and

- A** Capt. Ahmad Zainurrashid Bin Bunyamin
Sued in their capacity as
THE PRESIDENT AND HONORARY SECRETARY
OF MALAYSIA AIRLINES PILOTS' ASSOCIATION
- B** An association registered in Selangor under
Section 7 of the Societies Act 1966 with registration number
1296 (Selangor) and having its registered place of business
or address at No. 11-3 (2nd Floor), Jalan USJ 21/8,
- C** 47630 UEP Subang Jaya, Selangor. ... 2nd Defendants
- BEFORE THE HONOURABLE JUDICIAL COMMISSIONER TUAN HAJI
HAMID SULTAN BIN ABU BACKER, HIGH COURT II, KUCHING
- D** IN CHAMBERS
- CONSENT JUDGMENT
- UPON HEARING Mr. Shankar Ram Pohumall Asnani of Counsel for the Plaintiff,
Mr. Jubilant Austinway of Counsel for the first Defendants and Mr. Shankar Ram
Pohumall Asnani standing in for Mr. Shenton Maniam, of Counsel for the 2nd
E Defendants BY CONSENT AND WITHOUT ADMISSION OF LIABILITY IT
IS HEREBY ORDERED that:
- F** (1) The Plaintiff be re-employed with the first Defendants and to be
redeployed to any aircraft fleet not limited to F50 Fleet, if required,
to any base or location to be determined by the first Defendants,
either to the first Defendants main or subsidiary companies and be
paid salary based on no loss of seniority and also be given full benefits
and perks based on the MAPA Agreement 2004-2007, which
G includes guaranteed monthly productivity, housing allowance etc.
previously enjoyed prior to his termination;
- (2) In accordance with (1) above, the Plaintiff be re-employed with the
first Defendants up to 26th January 2012 and in accordance with the
MAPA Agreement 2004-2007;
- H** (3) That the Plaintiff be paid full back wages based on his last drawn
salary with the first Defendants from February 2007 up to date the
Plaintiff is re-employed with no interest;
- I** (4) The parties shall be at liberty to apply at any time for directions and
for compliance with terms (1) to (3) above;
- (5) Each party to bear its own costs and this suit be withdrawn;
- (6) Upon completion of orders (1) to (5) above, the Plaintiff shall have
no claims of whatsoever nature against the first and 2nd Defendants;

- (7) As between the Plaintiff and the 2nd Defendants, the Plaintiff shall have no claims against the 2nd Defendants and the parties shall bear their own costs.

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Dated this 14 June 2007.

Sgd.

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Senior Assistant Registrar

High Court II Kuching.

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This Consent Judgment is filed by Messrs. Thomas, Shankar Ram & Co. Advocates, Advocates for the Plaintiff, whose address for service is at No. 5, first Floor, Carpenter Street, 93000 Kuching, Sarawak.

INDORSEMENT

TO:

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(1) MALAYSIAN AIRLINE SYSTEM BERHAD

A Company registered under the Companies Act 1965

With Company No. 10601-W

E

Having a Registered and Business Address at:

Tingkat 3, Administration Building 1, MAS Complex A,

Sultan Abdul Aziz Shah Airport,

47200 Subang, Selangor.

F

Also having a place of business

At Lot 215, Bangunan MAS,

Jalan Song Thian Cheok,

G

93100 Kuching, Sarawak.

(2) Capt. Hizamuddin Bin Zainal Abidin and

Capt. Ahmad Zainurrashid Bin Bunyamin

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Sued in their capacity as

THE PRESIDENT AND HONORARY SECRETARY

OF MALAYSIA AIRLINES PILOTS' ASSOCIATION

An association registered in Selangor under

I

Section 7 of the Societies Act 1966 with registration

number 1296 (Selangor) and having its registered place of

business or address at No. 11-3 (2nd Floor), Jalan USJ 21/8,

A 47630 UEP Subang Jaya, Selangor.

NOTICE

(Order 45 rule 7)

B TAKE NOTICE that if you, the within-named, MALAYSIAN AIRLINE SYSTEM BERHAD by yourself, your servants or agents, each of you, jointly or severally disobey this CONSENT JUDGMENT you will be liable to process of execution for the purpose of compelling you to obey the same.

Dated this 18 June 2007.

C Sgd.

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Messrs Thomas, Shankar Ram & Co.,

D Advocates for the Plaintiff.

E [10] Subsequent to the first consent order, the first defendant issued a letter dated 4 October 2007 — exh R-21— to the plaintiff offering the plaintiff employment as F-50 commander on fixed term contract commencing on 18 October 2007 and expiring 25 January 2012 under Responsibility Centre 68KUL717. The letter exh R-21 contained all the terms and conditions of the plaintiff's employment including the salary to be paid to the plaintiff, accommodation, housing allowance, travel benefits, annual leave and medical leave and such other terms and conditions of employment purportedly in compliance with the terms of the first consent order. The material clauses in the letter exh R-21 that become the bone of contention between the parties are as follows:

G *Malaysia*
AIRLINES

CONFIDENTIAL

04th October 2007

H HR(R) 5.5.2-0857/07

Captain Rudolph Adrain Joseph

S/No: 0324216

I Lot 1569, Lorong Angsana 5B

Pisang Road West

93150 Kuching, SARAWAK.

Dear Captain Rudolph,

OFFER OF EMPLOYMENT ON A FIXED TERM CONTRACT

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We are pleased to offer you employment as F50 Commander on a fixed term contract commencing on 18th October 2007 and expiring on 25th January 2012, under Responsibility Centre 68KUL717.

This offer of employment is subject to the following conditions:

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1.1 Your passing a medical examination by a doctor nominated by Malaysia Airlines;

1.2 Your passing all the proficiency checks;

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for the entire duration of this contract.

02 Salary

You shall be paid a salary of RM19,012.8 per month.

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03 Terms and Condition of Employment

Unless otherwise stated herein, your other terms and condition of employment shall, where applicable be in accordance with the attached "Memorandum of Understanding between Malaysia Airlines System Berhad and Malaysia Airlines Pilot's Association On Terms and Conditions of Employment of Pilot 2004-2007".

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04 Employee Provident Fund (EPF)

You may choose to be a member of the Employee Provident Fund (EPF) if you wish to do so.

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05 Taxation

You shall be personally responsible for the income tax liabilities on your salary, allowances and other prerequisites of employment.

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Subsequent to the above, with immediate effect, you shall be posted to MASWings Sdn Bhd, based in Miri, Sarawak until the cessation of your employment with MAS. The following shall be the terms of your posting:

01. The Position

Commander F50

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02. Salary

There will be no change in your grade, salary and salary scale and you shall continue to be remunerated based on your current grade, salary and salary scale.

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03. Base

During the posting period, you will be based in Miri, Sarawak and shall be operating out of the following station:-

- A** Miri, Sarawak.
- You shall be provided with free travel from Kuching (KCH) to Miri (MYN) for the commencement of posting.
- B** 04. Accommodation
- You and your spouse will be provided with basic hotel accommodation for the first 14 (fourteen) days of the posting, after which you shall be responsible for obtaining your own accommodation and for the payment of such posting.
- C** In addition, the company shall provide an additional double-room for every 02 (two) children that accompany you at the place of posting (if applicable), during the same period as above.
05. Transportation
- D** MASWings Sdn Bhd will provide suitable ground transportation from your place of residence to the airfield for when you are to carry out your duties hereunder.
- If you are required to night stop at stations other than Miri, you will be provided with transportation by MASWings Sdn Bhd.
- E** 06. Allowances
- During the first 14 (fourteen) days of your posting, you shall be paid a daily allowance of RM81.00.
- F** You shall also be eligible to receive a monthly housing rental subsidy of RM900.00 during the entire posting period.
07. Travel Benefits
- G** Your wife and children (if applicable) will be provided with free subject-to-load air travel on Company's services once a month to the place of posting and for return to KUL, as stipulated in the current terms of your employment with the Company.
08. Annual Leave and Medical Leave Certificates
- H** During this period of posting, your application for annual leave and submission of medical leave certificates shall be forwarded to the Chief Pilot, MASWings Sdn Bhd for approval. Upon receipt of approval, the said application shall be forwarded to Ops Control Manager (Crew Planning and Scheduling) Malaysia Airlines for administrative purposes. Please clear all annual leave earned during your posting prior to reporting back for duty with the Company.
- I**

09. Confidentiality

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You shall treat all data, reports and information disclosed to you or received by you or discovered by you in the course of your posting, as strictly confidential and shall not at any time communicate the same to any third party.

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Please note that the Official Secrets Act 1972 shall apply to all data, reports, information and any materials originating from your posting.

10. Other Terms and Conditions

The terms and conditions mentioned above are not exhaustive but highlight the salient ones only.

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Other terms and conditions applicable during the posting period shall be as set out in the Memorandum of Understanding Between Malaysian Airline System Berhad and Malaysian Airline Pilot's Association of Terms and Conditions of Employment of Pilots 2004-2007.

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We are confident that you will execute your duties and responsibilities with full commitment and professionalism. Your contribution to the Company is greatly appreciated and should set as an example for others to follow.

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Kindly indicate your acceptance of this offer by signing and returning the duplicate copy of this letter by 16th October 2007.

We look forward to your joining the Company and wish you a rewarding career with Malaysia Airlines.

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Yours sincerely,

Sgd.

Effendi Abd Rahman

Senior General Manager, Human Resource

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cc: SGM Flight Operations

Manager Insurance

Senior Manager, HR Services (KLIA).

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[11] In the letter exh R-21 the plaintiff was given until 16 October 2007 to indicate his acceptance of the offer.

[12] The plaintiff alleged that the first defendant's letter of offer exh R-21 did not comply with the terms of the first consent order. In addition, the plaintiff also alleged that the letter was received by the plaintiff only on 16 October 2007 — a delay of 120 days from the date of entry of the first consent judgment. The plaintiff then filed a summons in chambers'

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A application in encl 23 to seek, inter alia, an order that the first defendant complies with the terms and conditions of cll (1) to (3) of the first consent judgment. Specifically the orders sought by the plaintiff were the following:

- B** (1) the plaintiff be re-employed with the first defendant and to be redeployed to any aircraft fleet not limited to F50 Fleet, if required, to any base or location to be determined by the first defendant, either to the first defendant main or subsidiary companies and be paid salary based on no loss of seniority and also be given full benefits and perks based on the MAPA agreement 2004-2007, which includes
- C** guaranteed monthly productivity, housing allowance etc. previously enjoyed prior to his termination;
- (2) in accordance with (1) above, the plaintiff be re-employed with the first defendant up to 26 January 2012 and in accordance with the
- D** MAPA agreement 2004-2007;
- (3) that the plaintiff be paid full back wages based on his last drawn salary with the first defendant from February 2007 up to date the plaintiff is re-employed with no interest.

E [13] The plaintiff's application in encl 23 is supported by the plaintiff's affidavit affirmed on 22 October 2007. Several grounds were advanced for the application. Firstly, the first defendant's letter, exh R-21 was issued in derogation and disobedience of the clear terms and conditions of the first

F consent judgment. Secondly, the application was absolutely necessary due to the lackadaisical or contumelious approach taken by the first defendant. Thirdly, the terms offered by the first defendant to the plaintiff vide their letter exh R-21 are inconsistent with MAPA agreement 2004-2007 and therefore inconsistent with the terms of the first consent judgment. Fourthly,

G unless strict compliance with the terms of the first consent judgment is ordered, the first defendant would make a mockery of the agreement (in terms of the consent judgment) entered between the parties. Fifthly, because of the first defendant's lackadaisical approach a situation was created whereby the plaintiff is in dire financial crisis, not being able to take up

H employment with other airlines, having to wait without salary and having to support his family and children.

I [14] At this juncture, it is pertinent to note that from the date of entry of the first consent judgment up to the date of the first defendant's letter, exh R-21, the first defendant did nothing at all to comply with the said consent judgment. This is the incontrovertible fact. The Federal Court in *Chia Yan Tek & Anor v Ng Swee Kiat & Anor* [2001] 4 MLJ 1, held at p 9 that, 'the effective date of judgement ... was the date of pronouncement in open court and not the date when it was signed ...'. In this case when the plaintiff

filed the summons in chambers in encl 23 for enforcement of the judgment in that the plaintiff is seeking an order to direct the first defendant to comply fully with the terms of the first consent order, there was already a delay of 120 days from the date of the first consent judgment to the date the first defendant issued the offer letter exh R-21. This delay is not denied or challenged by the first defendant. In his application in encl 23, the plaintiff prays for alternative prayer in para (6) that in the event the first defendant refuses or fails to re-issue the letter of offer to the plaintiff within 7 days from the date of the order incorporating all the amendments sought in orders (1) and (2) prayed for in the summons in chambers, the first defendant is to pay the plaintiff a sum of RM1,384,383.80 being full wages up to 26 January 2021 inclusive of housing allowance and guaranteed monthly productivity of 50 hours at the rate of RM48 per hour.

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[15] When the plaintiff's application in encl 23 came up for hearing on 19 December 2007, the parties consented to record and enter a consent judgment on the terms prayed for by the plaintiff including the alternative prayer Order (6). However subsequent to the recording of the consent judgment of 19 December 2007 (the two consent judgment — exh R-27 in plaintiff's affidavit in support of encl 43) there is still no full compliance by the first defendant. The plaintiff claimed that the first defendant's letter of 24 December 2007 (exh R-30 (2)) issued purportedly in compliance with the second consent order was not re-issued to the plaintiff as required by the terms in the second consent order. The defects in the first defendant's letter of 24 December 2007 (exh R-30(2)) were drawn to the attention of the first defendant's advocates by the plaintiff's advocates vide three letters, exhs R-29, R-30(1) and R-31. However first defendant still did not take steps to amend their letters of 24 December 2007 to ensure compliance with the first and second consent judgments. In consequence thereof the plaintiff filed summons in chambers' application, encl 43 against the garnishee to direct the garnishee to pay to the plaintiff as judgment creditor the garnishment sum agreed by the first defendant under prayer (6) of the second consent judgment due from the garnishee to the first defendant. When encl 43 came before me for hearing, the garnishee did not object to the application and in fact informed the court that it had the amount of money in the sum sought by the plaintiff and due to the first defendant. I also found that the first defendant had not complied with the terms of the first and second consent judgments. Accordingly I allowed the plaintiff's application for garnishment absolute in encl 43.

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[16] The first defendant then filed encl 73 for stay of the garnishment absolute order and also for orders ordering the plaintiff to return the money paid to his account by the garnishee back to the garnishee and also to restrain the plaintiff from using or spending the money so received.

- A [17] With that background scenario, I will now deal with the plaintiff's application in encl 43 and then I will state my reasons for my decision to dismiss encl 73, the first defendant's application for stay and injunction in another separate grounds.
- B [18] As stated above, encl 43 is the plaintiff's action to enforce the second consent judgment which has been agreed to by the parties pursuant to the plaintiff's application in encl 23. In particular the plaintiff wanted the first defendant to comply with the alternative prayer in para (6) of encl 23 ie to pay the plaintiff all the back wages inclusive of the allowances and forget about the re-employment of the plaintiff till the year 2012.
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- D [19] In arguing the encl 43 application, counsel for the plaintiff submitted that even after the second consent judgment the first defendant still failed to reissue the offer letter that would take back the plaintiff into the employment of the first defendant on the terms and conditions agreed in the first consent order.
- E [20] Following the second consent judgment, the first defendant issued a letter dated 24 December 2007 (exh R-30(2)) referring to the two consent judgments and enclosing the revised letter of offer of employment for the plaintiff (exh R-30(3)). The letter of offer is a letter offering the plaintiff's employment with the first defendant purportedly on the terms agreed in the first and second consent judgments. But the letter indicated to the plaintiff
- F that he must accept the offer before 16 October 2007. The letter of offer (ie exh R-30(3)) was a revised letter of offer and was dated 4 October 2007 because it was originally issued on that date in the wake of the first consent order. But it was rejected by the plaintiff as being not in compliance with the first consent order; as a result of which the plaintiff filed an application under
- G encl 23 and obtained the second consent judgment. This explains why in the letter exh R-30(2) the plaintiff was asked to indicate his acceptance of the offer by 16 October 2007. However, learned counsel for the plaintiff argues that this not only constituted a breach of the consent order which required the letter offer to be sent directly to the plaintiff and not through the
- H advocates; but also the first defendant is requesting the plaintiff to do the impossible by asking the plaintiff to indicate acceptance of the offer by or before 16 October 2007 when the letter enclosing the revised offer itself was dated and sent on 24 December 2007.
- I [21] The plaintiff also complained that the first defendant's letter of 24 December 2007 (exhs R-30(2) and R-30(1)) had breached specific terms of the second consent judgment by omitting or excluding from the offer certain allowances such as the housing allowance at RM900 per month that the plaintiff would be entitled to under the terms of the first consent

judgment in accordance with the MAPA agreement 2004–2007 which is binding on the first defendant. This non-compliance the plaintiff argues is in spite of the exchange of correspondences between the plaintiff's advocates and the first defendant's advocates before the issuance of the first defendant's letter of 24 December 2007, in an attempt to find the right and appropriate way to draft the offer letter to the plaintiff so that it can be in full compliance with the two consent judgments. This exchange of correspondences is evident by exh R-28 (2) the defendant's advocates letter dated 21 December 2007 to the plaintiff's advocates and the response by the plaintiff's advocates in exh R-28(1), a letter dated 22 December 2007 to the defendant's advocates.

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[22] In exh R-28(1), the plaintiff's solicitor letter dated 22 December 2007 to the first defendant's solicitor in response to an undated draft letter (exh R-28(2)) faxed to the plaintiff's counsel by the first defendant's counsel, learned counsel for the plaintiff pointed out several flaws in the draft letter (which was meant to be sent to the plaintiff by the first defendant) that do not comply with the second consent judgment. In the same letter, ie exh R-28(1) plaintiff's counsel also reminded the first defendant's counsel that under second consent judgment the time provided to the first defendant to comply is seven days and it also intimated to the counsel for the first defendant that in the event of non compliance the first defendant shall enforce order (6) of the second consent judgment strictly.

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[23] The plaintiff's counsel also sent exh R-29, a letter dated 24 December 2007, to the first defendant's counsel complaining about the first defendant revised letter of offer sent to the plaintiff as being non-compliance with the two consent judgments and also not in accordance with the MAPA agreement 2004–2007 which encompasses the spirit of the settlement between the first defendant and the plaintiff in the form of the two consent judgments. In the same letter the plaintiff's counsel gave notice to counsel for the first defendant to ensure full compliance by 4.30pm on 31 December 2007 failing which the plaintiff will enforce Order (6) of the second consent judgment without further reference to the first defendant or its counsel.

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[24] In its affidavit in opposition, affirmed by one Zulhaimi bin Othman the first defendant's Assistant General Manager, Manpower Resourcing, Human Resource Division, the first defendant deposed that the plaintiff's application in encl 43 is premature baseless and misconceived. It was deposed that the letter exh R-30(3) was issued by the first defendant to the plaintiff on 24 December 2007 incorporating terms of Orders (1) and (2) of the second consent judgment together with a cheque for the sum of RM208,657.72 through the plaintiff's solicitor for the plaintiff's backwages and other allowances as set out in cl (3) and (5) of Order 2 of the second consent judgment. The first defendant deposed that letter exh R-30(2) and

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A the cheque was sent to the plaintiff's solicitor for onward transmission to the plaintiff on 24 December 2007 ie within the seven days period as stipulated in the second consent judgment.

B [25] However the plaintiff's solicitor has responded to the letter
C exh R-30(2) on the same day alleging that the contents of the letter of offer
D are inconsistent with the terms and spirit of MAPA agreement 2004–2007
and the second consent judgment. The first defendant disagreed. However it
was said in para 8 of the first defendant's affidavit that the first defendant
agreed to revise the wordings of the letter exh R-30(2) for the sake of clarity,
in good faith and in the spirit of settlement. The first defendant also
contended that when the plaintiff's solicitor in his letter dated 24 December
2007 in response to the first defendant's letter exh R-30(2) gave the first
defendant until 4.30pm on 31 December 2007 the time for compliance by
first defendant has thus been extended.

E [26] In para 16 of the first defendant's affidavit in opposition, the first
defendant admitted, following the plaintiff's counsel's letter of 24 December
2007 exh R-30(1), seeking the views of the plaintiff's solicitor on the changes
required to the first defendant's letter exh R-30(2). As a result the plaintiff's
counsel forwarded a draft version of the revised exh R-30(2) containing the
plaintiff counsel's proposed changes which the first defendant deposed in its
affidavit that it agreed to accept in good faith and in the spirit of settlement
despite the fact that the proposed increase in back wages was not in
accordance with the terms of the second consent judgment. The first
defendant averred in its affidavit that it did not agree with other changes
proposed by the plaintiff in exh R-34(2) which is inconsistent with the
MAPA agreement 2004–2007 and the terms of the consent judgment and
which are new or additional terms not in the consent judgments or mutually
agreed. But the first defendant did not spell out which were the proposals in
the plaintiff solicitor's letter exh R-34(2) that it did not accept.

H [27] In any event the first defendant did revise the letter of offer to the
plaintiff by issuing a letter exh R-35 dated 27 December 2007. However the
first defendant averred in its affidavit, at para 14, that it had issued the revised
offer letter exh R-35 by mistake because that letter was the based on the
unamended proposed draft by the plaintiff's solicitor in exh R-34(2). The
first defendant then quickly issued a letter exh R-36(l) to revoke the offer
letter exh R-35 and followed by a revised version of exh R-35 in the form of
I a letter exh R-36(3) and two cheques for the sum of RM254,808.88 being
payment of the backwages calculated up to December 2007.

[28] So, is exh R-35 issued by mistake as claimed by the first defendant?
I do not think so. Firstly, on receiving the plaintiff solicitor's proposed draft

in exh R-34(2) the first defendant said that it realised that it was not what the first defendant thought to be the terms in the consent judgments; but nevertheless still agreed to accept it for the sake of settlement. Secondly, in the plaintiff's affidavit in reply to the first defendant's affidavit in opposition the plaintiff had deposed that after the letter exh R-35 was issued there was telephone conversation and correspondence by e-mail between the plaintiff's advocates and the first defendant's advocates, Mr Jubilant Austinway persuading the plaintiff to accept the offer in the letter exh R-35. This fact was not denied in the first defendant's affidavit in opposition II affirmed by Mr Jubilant Austinway on 11 January 2008 in which at para 5(1) of the affidavit Mr Jubilant Austinway said the e-mail correspondences were 'to facilitate and to resolve once and for all issues arising' from the first defendant's letter exh R-30(3) dated 4 October 2007. This would show that the first defendant intended to comply fully with the terms of the consent judgments in the manner proposed by the plaintiff's advocates in exh R-34(2). But on the eleventh hour the first defendant changed its mind. Thirdly, the first defendant's counsel who had been in negotiation with the plaintiff's advocates over the draft of the offer letter did not take any step to inform the plaintiff's advocates the parts of the proposal contained in exh R-34(2) that were not acceptable to the first defendant upon realising that they were purportedly not part of the consent judgments, before issuing the revised offer in exh R-35 to the plaintiff.

[29] On the facts and evidence disclosed in the affidavit supporting the plaintiff's application in encl 43 as briefly alluded to above, I am satisfied that the first defendant has failed to comply with the terms of the two consent judgments. It would appear that the revised letter of offer dated 4 October 2007 issued to the plaintiff vide letter dated 24 October 2007 is the first attempt to vary the terms of the consent order by not including in the offer the entitlements of the employment due to the plaintiff as agreed and envisaged in the consent judgments in the spirit of MAPA agreement 2004–2007. This variation is not with the consent of the plaintiff. In *Visia Finance Bhd v Expert Credit & Leasing Sdn Bhd & Ors* [1998] 2 MLJ 705 it was said, at p 712, that 'An order made by consent in the absence of fraud, can only be varied by consent. It would be a denial of justice to permit a party to resile from what his counsel decided for him merely because he lost'. See also the case of *Zainudin bin Muhammad v Atsco Ltd & Anor* [2003] 1 MLJ 369 (CA). The first defendant did not file any affidavit in opposition to the plaintiff's application in encl 23. Therefore the averments or assertions made by the plaintiff, in his affidavits in support of the application, ought to be taken as correct or the truth. The law is settled on this point: that is when a party made a positive averment or assertion in an affidavit, and the other party does not dispute or challenge such averment or assertion, then the averment or assertion must be true.

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A [30] For the above reasons I allowed the plaintiff's application in encl 43.

Application in encl 43 allowed.

B Reported by Sally Kee

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